IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 418

CURTIS M. SIMPSON, Warden, Kilby Prison,
Montgomery, Alabama,

Petitioner,

vs.

WILLIAM S. RICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Constitutional Provisions Involved

The Fifth Amendment to the Constitution of the United States provides in part:

> "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself ..."

The Sixth Amendment to the Constitution of the United States provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial ..."

The Eighth Amendment to the Constitution of the United States provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Thirteenth Amendment to the Constitution of the United States provides:

> "Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

I.

When constitutionally defective sentences are set aside on post-conviction review and Respondent is re-tried and convicted on the same charges, may the State of Alabama punish Respondent for having exercised his post-conviction right of review and for having the original sentences declared unconstitutional by subjecting him to a punishment three times greater than originally imposed?

II.

When Respondent serves two years, six months, and twelve days on sentences thereafter vacated because of a State Court constitutional error at the original trials, may the State of Alabama, upon Respondent's being re-tried and convicted on the same charges, increase his sentences threefold and deny him credit on such sentences for time previously served?

Statement of the Case

The statement of the case as contained in Petitioner's brief is substantially correct, but fails to refer to certain portions of the Appendix which Respondent feels relevant to the questions presented.

Only two persons testified at the hearing below. They were the Respondent, William S. Rice (A. 96-113), and Respondent's witness, M. S. Dean, Record Clerk for the Alabama State Board of Corrections (A. 75-90).

Respondent, William S. Rice, testified that to his knowledge he was the first prisoner to file *coram nobis* proceedings in the Circuit Court of Pike County, Alabama, after the *Gideon* and *Escobedo* decisions rendered by this Court (A. 99) and that the same judge who first sentenced him upon his pleas of guilty later set the convictions aside and imposed the threefold greater sentences upon him after retrial (A. 97). Respondent testified that he knew of no additional evidence to which the State had access on second trial which was not available upon his first convictions (A. 99) or of any other explanation for the increase in his sentences and the denial of credit on his new sentences for the two and one-half years already served (A. 102-103).

Mr. M. S. Dean testified that a state prisoner who has the first of several consecutive sentences set aside is given credit on his next valid sentence for time actually served on the vacated sentence, but that there is "no way" to give credit to a prisoner who has all of his convictions vacated and is then resentenced on the same charges (A. 94). He admitted that his department had not given Respondent Rice any kind of credit on his later sentences for the two and one-half years already served (A. 96).

No witnesses were called by Petitioner (A. 113). The Assistant Attorney General merely pointed out that the first sentences were on pleas of guilty while the last sentences were imposed after trials on pleas of not guilty (A. 87), and referred the Court to Exhibit "F" of Petitioner's Return and Answer, an affidavit of the Pike County Solicitor which is set out in part on page 3 of Petitioner's brief (A. 55, 89). The District Court apparently did not consider the affidavit competent or sufficient evidence to support Petitioner's contention that one of the cases against Respondent was nol-prossed in order to compensate him for time he had already served (A. 70-71).

The District Court found, from evidence which it characterized as uncontroverted, that the Respondent was given no credit for the two years, six months and twelve days he had served on Case No. 6427, either when resentenced on that case or when resentenced on the other two cases which were retried (A. 61-62). It specifically found that Case No. 6429 was nol-prossed, not in order to compensate Respondent for prior time served, but "for some reason other than a sympathetic one toward Rice" (A. 70-71). The District Court also noted that Petitioner had offered no

evidence attempting to justify the over threefold increase in sentences upon retrial, and found as follows:

> "Under the evidence in this case, the conclusion is inescapable that the State of Alabama is punishing petitioner Rice for his having exercised his post-conviction right of review and for having the original sentences declared unconstitutional" (A. 69).

Summary of Arguments

I.

The imposition of greater sentences upon Respondent on his second trials for the same offenses after his original sentences were vacated for constitutional error was unconstitutional in that it violated the Due Process and Equal Protection provisions of the Fourteenth Amendment and the Double Jeopardy clause of the Fifth Amendment.

A. Increased Sentence Is a Denial of Due Process.

It is a denial of due process for the State of Alabama to punish a defendant for having exercised his post-conviction right of review, or to condition his right of post-conviction review upon his assuming a risk of harsher punishment if his original sentence is declared constitutionally defective.

B. Increased Sentence Is a Denial of Equal Protection.

It is a denial of Equal Protection to unjustly discriminate against those defendants who successfully seek post-conviction relief by exposing that class of persons to the risk of an increased sentence where, as in Alabama, there can

be no increase in sentence of those persons who do not seek relief.

C. Increased Sentence Places a Defendant in Double Jeopardy.

An increased sentence on retrial subjects a defendant to multiple punishment for the same offense in violation of the Double Jeopardy clause, and fails to recognize that the judge who imposed the first sentence had selected a punishment to fit the crime and had impliedly acquitted the defendant of criminal conduct requiring any greater sentence.

II.

Failure of the State of Alabama to give Respondent credit on new valid sentences for time served under prior invalid sentences for the same offenses was unconstitutional in that it violated the Due Process and Equal Protection provisions of the Fourteenth Amendment, the Double Jeopardy clause of the Fifth Amendment, the Thirteenth Amendment's prohibition against involuntary servitude and the Eighth Amendment's prohibition against cruel and unusual punishment, and denied Respondent the right to a speedy trial secured to him by the Seventh Amendment.

A. Denial of Credit Is a Denial of Due Process.

It is fundamentally unfair and shocking to the public conscience for the State of Alabama to deny credit to a defendant sentenced on retrial for time served under a prior invalid conviction for the same offense. It is also a denial of Due Process to condition a defendant's right of post-conviction review upon his relinquishment of prior time served in the event he obtains a new trial.

B. Denial of Credit Is a Denial of Equal Protection.

It is a denial of equal protection of law to unjustly discriminate against those defendants who successfully seek post-conviction review by denying them credit for time actually served in prison if they are subsequently convicted of the same offense, where those prisoners who elect not to seek post-conviction relief are given credit for time actually served. Those prisoners who are able to make bond pending the outcome of such review are not required to suffer imprisonment, and those prisoners who have one of several consecutive sentences set aside are given credit on the valid sentences for time served on the void sentence.

C. Denial of Credit Places a Defendant in Double Jeopardy.

A defendant who, upon resentencing, is not given credit for prior time served in the same case is subjected to multiple punishment for that single offense in violation of the Double Jeopardy clause.

D. Denial of Credit Subjects a Defendant to Involuntary Servitude.

Where a defendant is denied credit, upon resentencing, for prior time served in the same case, under the theory that once the original conviction was set aside the State may refuse to recognize the incidents of that conviction and may ignore the time served, the time which defendant served was not as punishment for a crime of which he had been duly convicted, and his prior incarceration by the State amounts to involuntary servitude which is forbidden by the Thirteenth Amendment.

E. Denial of Credit Is Cruel and Unusual Punishment.

The denial, upon resentencing, for prior time actually served by a defendant in the same case, is so completely arbitrary and shocking to the sense of justice as to constitute cruel and unusual punishment, the collective punishment being greatly disproportionate to the offense committed.

F. Denial of Credit Is a Denial of Defendant's Right to a Speedy Trial.

Where, upon retrial and resentencing after a prior conviction for the same offense has been vacated for constitutional error, the State refuses to recognize the existence of the prior conviction and the time served by the defendant under that conviction, the defendant may logically reply that, the State having no explanation for the delay which existed between defendant's arrest and his valid conviction, he has been denied the right to a speedy trial.

ARGUMENT

I.

The Imposition of Greater Sentences Upon Respondent on His Second Trials for the Same Offenses After His Original Sentences Were Vacated for Constitutional Error Was Unconstitutional in That It Violated the Due Process and Equal Protection Provisions of the Fourteenth Amendment and the Double Jeopardy Clause of the Fifth Amendment.

A. Increased Sentence Is a Denial of Due Process.

Petitioner, both in its petition and in its brief, has completely failed to set forth the main basis for the holdings and opinions of the Courts below. The District Court found from the evidence that Respondent has been given greater sentences on the retrials of his cases *as punishment* for his having exercised his post-conviction right of review and having caused his original convictions to be set aside (A. 69). It seems hardly necessary to point out that such action by the State of Alabama is a denial of due process and runs counter to the most elemental concepts of justice. *Short* v. *United States*, 344 F.2d 550 (D.C. Cir. 1965).

Petitioner argues that "a defendant, in obtaining a new trial, assumes the risk of a more severe sentence than was first imposed . . :" The idea that in pursuing a new and fair trial a defendant consents to the possibility—or likelihood—of harsher punishment if again convicted is a cruel fiction. The unfairness of this proposition becomes glaringly apparent when one considers that it was the State's initial failure to give him a fair trial which created the situation, yet it is the defendant who the State would have

"assume the risk" of increased punishment with no credit for time served if he seeks what was denied him in the first instance. This conditioning of the right of post-conviction review upon an assumption of the risk of more severe sentence at a subsequent trial is no less unreasonable than punishing a defendant for seeking a new trial. It withholds from a defendant his constitutional right to a fair trial, which the State had denied him, unless the defendant agrees to waive his immunity from an increase in his sentence. The effect of such an "unconstitutional condition" is to inhibit a person wrongfully tried by the State in the first instance from seeking and obtaining a trial free of constitutional defects. See Note, *Unconstitutional Conditions,* 73 Harv. L. Rev. 1595 (1960).

The matter of increased sentences upon retrial has been considered recently by several of the Federal District Courts and Circuit Courts of Appeal. In *Patton* v. *North Carolina,* 256 F.Supp. 225 (W.D.N.C. 1966), the District Court held that it would not be constitutionally permissible to impose a harsher sentence upon retrial unless some justification was shown for it. The Fourth Circuit, reviewing the case, did not agree that an increased sentence could be justified at all "even where additional testimony had been introduced at the second trial." *Patton* v. *North Carolina,* 381 F.2d 636 (4 Cir. 1967). The First Circuit has held that a defendant's sentence could not be increased upon retrial, even where the trial judge stated the reason for the harsher sentence, unless the reason for the increase was based solely upon events subsequent to the first conviction. *Marano* v. *United States,* 374 F.2d 583 (1 Cir. 1967).

In the case at bar the District Court below, while citing *Marano,* adopted the rule expressed by the trial court in *Patton*:

> "This court, after considerable study, has concluded that a sentence imposed by a court on retrial after post-conviction attack that is harsher than the sentence originally imposed—unless some justification appears therefor—violates the Due Process Clause of the Constitution of the United States (A. 64).
>
> "This court does not believe that it is constitutionally impermissible to impose a harsher sentence upon retrial if there is recorded in the court record some legal justification for it" (A. 68).

The court then held that the burden was on the State to justify any increase in the original sentences presumably by reference to some court record (A. 68). *Gainey* v. *Turner*, 266 F.Supp. 95 (E.D.N.C. 1966); *Patton* v. *North Carolina*, 256 F.Supp. 225 (W.D.N.C. 1966). With reference to the uncontroverted facts (A. 61), the District Court found:

> "Here, the State of Alabama offers no evidence attempting to justify the increase in Rice's original sentence. * * * It is shocking that the State of Alabama has not attempted to explain or justify the increase in Rice's punishment—in these three cases, over threefold" (A. 69).

Even if the compelling logic of the *Patton* and *Marano* decisions be ignored, Respondent again respectfully suggests that the evidence in this case—that Respondent's sentences were increased to punish him for having successfully exercised his post-conviction right of review—fully supports the opinion of the courts below which concluded that the increase in Respondent's sentences violated the Due Process Clause of the Constitution of the United States.

B. Increased Sentence Is a Denial of Equal Protection.

In Alabama there can be no increase in sentence after sentence is imposed. To deny this protection to that class of prisoners who elect to exercise post-conviction remedies is to unjustly discriminate against persons already denied a fair trial. The imposition of greater sentences on prisoners solely because they pursue post-conviction remedies bears no rational connection with any legitimate state interest and creates an arbitrary classification among prisoners which violates the Equal Protection Clause of the Fourteenth Amendment. *Patton* v. *North Carolina,* 381 F.2d 636 (4 Cir. 1967). It is as logical and just to forbid classifications which discriminate against prisoners wrongfully convicted as to forbid classifications which discriminate against the poor. *Griffin* v. *Illinois,* 351 U.S. 12 (1956). In neither instance is there any rationality as to the nature of the class singled out or relevancy to the purpose for which the classification is made. *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966).

C. Increased Sentence Places a Defendant in Double Jeopardy.

The courts below did not base their decisions upon double jeopardy grounds, although several courts have recently done so in spite of the half-century old case of *Stroud* v. *United States,* 251 U.S. 15 (1919).

The case of *Green* v. *United States,* 355 U.S. 184 (1957), reversed a first degree murder conviction on retrial where the original conviction had been of second degree murder, the Court holding that the first jury had "impliedly acquitted" the prisoner of first degree murder. Several California courts have adopted the theory of *Green* and applied

it in situations where, as in this case, longer sentences are involved but not different "degrees" of a crime. *People* v. *Ali*, 57 Cal. Rptr. 348, 424 P.2d 932 (1967); *In re Ferguson*, 233 Cal. App. 2d 79, 43 Cal. Rptr. 325 (1965); *People* v. *Henderson*, 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P.2d 677 (1963). These courts take the position that the prisoner was "impliedly acquitted" of any longer sentence than he actually received at his first trial and upon retrial can receive no greater sentence than before, lest he be reprosecuted for an offense of which he has been acquitted.

The Fourth Circuit, however, took a different approach in *Patton* and pointed out that in *Stroud* the Court did not consider that aspect of double jeopardy which prohibits multiple punishment for the same offense and which therefore prohibits any increase in punishment following retrial. For a brief examination of this theory see the discussion of the District Court decision in *Patton* in 80 Harv. L. Rev. 891 (1967).

II.

Failure of the State of Alabama to Give Respondent Credit on New Valid Sentences for Time Served Upon Prior Invalid Sentences for the Same Offenses Was Unconstitutional in That It Violated the Due Process and Equal Protection Provisions of the Fourteenth Amendment, the Double Jeopardy Clause of the Fifth Amendment, the Thirteenth Amendment's Prohibition Against Involuntary Servitude and the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment, and Denied Respondent the Right to a Speedy Trial Secured to Him by the Seventh Amendment.

A. Denial of Credit Is a Denial of Due Process.

At the time Respondent's original convictions were vacated as the result of coram nobis proceedings in the State Courts, he had been in prison for over two and one-half years (A. 62). When resentenced after his second trials, Respondent was not given credit on his new sentences for the time previously served (A. 62). The District Court, citing *Hill* v. *Holman*, 255 F.Supp. 924 (M.D. Ala. 1966), and *Patton* v. *North Carolina*, 381 F.2d 636 (4 Cir. 1967), held as follows:

> "This rule of due process is applicable in this case and will not allow the State of Alabama to permit petitioner to be penalized by service in the state penitentiary because of an error the Circuit Court of Pike County made . . . He was . . . constitutionally entitled, upon being resentenced . . . to be given credit for each of the days he had served upon the voided sentence . . ."

Not only is the Due Process Clause violated because it is so grossly unfair and shocking to deny a defendant credit for prior time served on the same offense by simply refusing to recognize the years served under a void sentence, it is also violated in that a defendant's legal right of post-conviction review is thereby conditioned upon his relinquishment of prior time served in the event he is successful. *Gray* v. *Hocker*, 268 F.Supp. 1004 (D. Nev. 1967). Respondent submits that this amounts to an "unconstitutional condition", which denies persons wrongfully convicted the right to pursue unfettered the post-conviction remedies made available by the State.

B. Denial of Credit Is a Denial of Equal Protection.

The State of Alabama would deny credit for time served in prison to that class of prisoners who successfully seek post-conviction review if they are subsequently resentenced on the same charges. This creates an invidious classification which violates the principle of Equal Protection by unfairly discriminating against persons already denied a fair trial who must bide their time in prison awaiting post-conviction relief. It is arbitrary and unreasonable to deny these prisoners credit for this time spent in jail where full credit is given to those prisoners who elect not to seek post-conviction relief. Of course, those defendants who are able to make bond pending the outcome of such review are not required to suffer imprisonment at all. This kind of unnecessary discrimination between defendants has been repeatedly condemned by this Court. *Lane* v. *Brown*, 372 U.S. 477 (1963); *Draper* v. *Washington*, 372 U.S. 487 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963); *Griffin* v. *Illinois*, 351 U.S. 12 (1956).

Petitioner points out that the State of Alabama now follows the decision in *Hill* v. *Holman,* 255 F.Supp. 924 (M.D. Ala. 1966), and allows a prisoner credit for time served on a void sentence when there is another valid sentence pending against him during the period such time was served, but says that *Hill* should not control the case at bar.

Petitioner attempts to distinguish the factual situation in *Hill* v. *Holman, supra,* from the circumstances surrounding Respondent's imprisonment. Respondent submits that the distinction is not only forced, but is clearly arbitrary and unreasonable. The State reasons that when one of Hill's several sentences was vacated, the time he had served on that sentence was applied to the valid sentences because they "existed during the period such time was served." However, the State says in this case, because *all* and not *some* of Respondent's sentences were vacated, then he is not entitled to receive credit for the time served when resentenced for the same offenses, because once the original sentences were vacated no valid judgment was then pending against him to which the time served could attach. Respondent submits that this reasoning is without rhyme or reason —unless it be administrative red tape. It ignores the simple but important fact that Respondent was resentenced for the identical offenses for which he was originally sentenced, and suggests that Respondent is urging that a prisoner be allowed to serve a sentence prior to his conviction. Respondent is not attempting to have past prison time apply to a sentence for a crime not committed at the time of his original prosecutions, and the lower Courts did not hold that this would be proper. Respondent was tried and sentenced for committing certain offenses; he served at least a portion of the punishment imposed because of these of-

fenses; and he was retried by the *same* Court and resentenced by the *same* judge for committing the *same* offenses. While the case of *Newman* v. *Rodriguez*, 375 F.2d 712 (10 Cir. 1967) does hold that time served need not be credited against a new sentence, it does not discuss the artificial factual distinction attempted by Petitioner in its brief. Should Petitioner's reasoning be followed, a prisoner sentenced on a single offense and later retried and resentenced for the same offense could be compelled to serve more time under the two sentences than the maximum punishment provided by law. A single offense was involved in *Patton*, as in the cases of *Holland* v. *Boles*, 269 F.Supp. 221 (N.D.W.Va. 1967) and *Gray* v. *Hocker*, 268 F.Supp. 1004 (D. Nev. 1967), which hold that credit must be given.

In the case at bar, Respondent had served over two and one-half years in Case No. 6427 when it and his three other sentences were set aside. When resentenced to ten years in that same case, he was given no credit for his prior time. Thus, except for the decisions of the lower Court herein, he could have been required to serve more than the maximum of ten years fixed by law for the crime for which he was convicted. It is noteworthy that the unreported opinion of the Supreme Court of Alabama, in *Ex parte State of Alabama, ex rel. Attorney General*, 6th Div. 543, a copy of which is printed in Appendix B of Petitioner's brief, holds:

> "When a defendant is resentenced, the total sentence in point of time, when added to the time already served including credit for good behavior, should not exceed the maximum . . ."

The lower courts also held that Respondent would be entitled to credit for "good time" earned during his several

periods of incarceration (A. 63 & 71). *Short* v. *United States,* 344 F.2d 550 (D.C. Cir. 1965); *Hill* v. *Holman,* 255 F.Supp. 924 (M.D. Ala. 1966); see also *Hoffman* v. *United States,* 244 F.2d 378 (9 Cir. 1957); and *Youst* v. *United States,* 151 F.2d 666 (5 Cir. 1945). Although the District Court below found that Respondent did not earn any "good time" while serving his first sentences, it went on to compute the "good time" earned since resentencing (A. 72). Petitioner does not now seem to object to these computations and we accordingly assume that the State now concedes that such portion of the opinion of the lower Court was correct.

C. Denial of Credit Places a Defendant in Double Jeopardy.

As pointed out in the preceding argument, the State of Alabama attempted to require Respondent to serve more than the maximum sentence of ten years fixed by law for one of the crimes for which he was convicted. This serves to illustrate Respondent's contention that failure to credit him for prior time served in the same case constitutes multiple punishment for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment. *Patton* v. *North Carolina,* 381 F.2d 636 (10 Cir. 1967). While it is true that Respondent agreed to and even sought a second trial, he certainly did not seek or agree to multiple punishment for one offense. See *Ex parte Lange,* 85 U.S. 163, 168 (1873), where the Court said:

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And . . . there has never been any doubt of . . . [this rule's] entire

> and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense."

Admittedly, this court has not expressly ruled that the Double Jeopardy Clause is applicable to the State. However, this issue is now before the Court in *Benton* v. *Maryland* (No. 201 October Term, 1968), and may be decided in that case.

D. Denial of Credit Subjects a Defendant to Involuntary Servitude.

By denying Respondent credit, upon resentencing, for prior time served in the same case, under the theory that once the original convictions are set aside the State may refuse to recognize the incidents of that conviction and may ignore the time actually served, the State's original incarceration of the Respondent amounted to involuntary servitude, for the time which Respondent served was not as punishment for a crime of which he had been duly convicted.

In the case of *United States* v. *Morgan*, 222 F.2d 673, 674 (2 Cir. 1955) the court said:

> "[A] defendant's assistance by counsel in a criminal trial is an absolute right . . . A conviction in a case where the defendant has not enjoyed that fundamental right is void. His imprisonment also violates the Thirteenth Amendment which forbids involuntary servitude, except as 'punishment for crime', since no punishment for crime can be valid unless after a valid trial or a valid plea of guilty."

See also *U. S. ex rel. Caminito* v. *Murphy,* 222 F.2d 698 (2 Cir. 1955), cert. den. 350 U.S. 896 (1955).

If a defendant is released after the judgment is set aside there is no way the years spent in jail can be returned to him. But if he is re-convicted for the same offense, those years *can* be returned—by the simple device of reducing the second sentence by time served under the first. This much the Thirteenth Amendment requires.

E. Denial of Credit Is Cruel and Unusual Punishment.

The Eighth Amendment's ban on cruel and unusual punishment is made obligatory on the States through the Fourteenth Amendment. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

The denial, upon resentencing, for prior time actually served by a defendant in the same case, is so completely arbitrary and shocking to the sense of justice as to constitute cruel and unusual punishment particularly where, as in the case at bar, the Respondent's collective punishment in case No. 6427 exceeded the maximum punishment provided by law.

F. Denial of Credit Is a Denial of Defendant's Right to a Speedy Trial.

In *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967), this Court held that the Sixth Amendment's guaranty of an accused's right to a speedy trial was rendered applicable to the states through the Due Process Clause of the Fourteenth Amendment.

Petitioner, by refusing to credit Respondent, upon resentencing, with prior time served on the same offense, implies that because the earlier sentences were vacated it may

ignore Respondent's prior prison service as though he had never served it. Respondent respectfully suggests that he may as logically take the position that, because of a more than two year delay between the time of his arrest and the time he was appointed counsel and brought to trial, he was denied his right to a speedy trial, one of the most basic rights preserved by the Constitution.

Conclusion

In its brief Petitioner does not attempt to justify the State's policy of denying credit to prisoners for prior time served in the same case. With respect to increased sentences upon retrial, its only explanation is that a *guilty* person who pleads guilty should receive a lesser sentence than one who insists on a trial. We do not agree that this is a "heathy situation", for the same choice is offered those accused persons who may be innocent. Indeed, it can be argued that the reward of a lesser sentence for a plea of guilty compels an accused to be a witness against himself in violation of the Fifth Amendment and imposes upon his right to a fair trial an unconstitutional condition that he forfeit the benefit of a lesser sentence offered by the State.

The District Court below heard the evidence and was startled and shocked by the treatment afforded Respondent by the State of Alabama (A. 69, 88). Its conclusion, adopted by the Circuit Court below, that Respondent was denied due process and the equal protection of the law is logical and just.

For the reasons set out in this brief, it is respectfully submitted that the decision below should be affirmed.

Respectfully submitted,

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The undersigned hereby acknowledge service of a copy of the foregoing Brief of Respondent.

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